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Supreme Court, U.S.
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No. 93-31

THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DON N. WEST,

Petitioner,

vs.

BUFFALO CENTER-RAKE
SCHOOL DISTRICT, BY ITS
BOARD OF DIRECTORS,

Respondent.

PETITION FOR WRIT OF
CERTIORARI FROM THE COURT
OF APPEALS OF IOWA

PETITION FOR WRIT OF CERTIORARI

MARK S. SOLDAT
COUNSEL OF RECORD
714 East State Street
Algona, Iowa 50511
(515) 295-9463

MARY JANE WHITE
405 West Main Street
Waukon, Iowa 52172
(319) 568-3551

ATTORNEYS FOR DON N. WEST

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Questions Presented For Review

A. An Iowa statute provided for the manner in which the automatically-renewed contracts of school administrators may be terminated. In this case, an Iowa appellate court declared that such a contract was property protected by the due process clause.

This Iowa statute also provided a termination standard of just cause for all administrators, except superintendents. For superintendents, it provided no standard whatsoever. The subject of this case was the termination of an automatically-renewed contract with the petitioner, a superintendent.

Therefore, the first question presented is whether the Iowa statute, as well as the termination decision made under it, were invalid under the Due Process Clause of the Fourteenth

Amendment because of vagueness and the absence of any standard sufficient to have enabled the petitioner to protect himself against an arbitrary and discriminatory termination decision.

B. In this case, the decisionmaker applied and the Iowa appellate court affirmed, purportedly under the statute enumerated in paragraph A, *supra*, a termination standard which they coined as reasonable foundation. Neither defined what that standard was. Neither explained how it applied that standard. Neither identified any supportive source for that standard, other than the manual of a private school board association. This manual too did not define the standard or explain how or why it should be applied.

Therefore, the second question

presented is whether the application of an undefined and unfoundationed standard for termination to the petitioner's contract was invalid under the Due Process Clause of the Fourteenth Amendment because of vagueness and the absence of any actual standard sufficient to have enabled the petitioner to protect himself against an arbitrary and discriminatory termination decision.

C. Under the statute enumerated in paragraph A *supra*, the termination decisionmaker was the school board. Under this statute, the school board was required to base its decision solely on the record evidence. Under this statute, however, the evidence was received into the record by an administrative law judge, who also rendered a proposed decision.

In this case, a majority of the school board members testified under oath before the administrative law judge that they believed the charges against the superintendent were true.

In this case, evidence also was presented that prior to the commencement of the termination proceedings, six of the seven school board members stated to petitioner in person that they would terminate his contract. In this case, there further was uncontroverted evidence that two school board members who later participated in the termination decision publicly declared their goal to terminate the superintendent and that another two adjudged whether petitioner made personal aspersions against them.

Based on this evidence, petitioner challenged the decisionmakers' impartiality. Despite these challenges,

neither the decisionmaker, nor the Iowa courts addressed the impact of the testimony or meaningfully confronted the other evidence of impartiality.

Therefore, the third question presented for review is whether the decision to terminate was made by a fair and impartial decisionmaker, and if not, whether that decision resultingly was invalid under the Due Process Clause of the Fourteenth Amendment.

D. The statute enumerated in paragraph A *supra*, as interpreted by the Iowa appellate court in this case, provided that the administrative law judge had no power to compel the production of evidence. This same statute, as so interpreted, also provided that no reviewing body thereafter had the power to compel or receive evidence.

In this case, petitioner unsuccessfully requested the administrative law judge to compel the school board to produce as evidence the tape recording of its secret meeting in which six out of the seven board members stated to the petitioner in person that they would terminate his contract. In this case, the petitioner unsuccessfully requested the Iowa courts to make this tape recording, [which he subsequently and indirectly obtained], part of the record. The tape recording contradicted the board members' testimonies before the administrative law judge and the Iowa court's characterizations of the termination statement made to the petitioner.

Therefore, the fourth question presented for review is whether the failure of the termination procedure, as

prescribed and applied, to permit the petitioner to present evidence critical to his defense invalidated under the Due Process Clause of the Fourteenth Amendment the resulting decision to terminate his contract.

E. An Iowa statute provided for the furnishing of an administrative law judge for the termination proceeding conducted under the statute enumerated in paragraph A *supra*. This same statute required the petitioner to pay for half of the judge's fee and related hearing expenses. Although a question was raised as to whether this statute was in effect during the termination proceedings which occurred in this case, the Iowa appellate court nevertheless required the petitioner to pay for half of the hearing expenses.

Therefore, the fifth question presented for review is whether this requirement that the petitioner pay for the hearing expenses was invalid on its face because it imposed a significant, unjustified, and open-ended penalty on the exercise of rights guaranteed under the Due Process Clause of the Fourteenth Amendment.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE CASE

On April 9, 1990, the Hon. Gaylen V. Hassman, Administrative Law Judge, issued an opinion in the form of a proposed decision. This decision, the first opinion in this case, was filed with the Board of Directors, Buffalo Center-Rake School District, Buffalo Center, Iowa, but was not otherwise reported.

On April 30, 1990, the Board of Directors, Buffalo Center-Rake School District, issued an opinion in the form of a final decision. This decision was filed with the Board, but was not otherwise reported.

On August 1, 1991, the Hon. John S. Mackey, Iowa District Court Judge, filed an opinion in the form of a judgment on appeal. This judgment was filed with the Clerk, Iowa District Court for Winnebago County, Forest City, Iowa, but was not

otherwise reported.

On February 2, 1993, the Court of Appeals of Iowa, Donielson, J., filed an opinion. This judgment was filed with the Clerk, Supreme Court of Iowa, Des Moines, Iowa, but was not otherwise reported. In fact, on April 8, 1993, the Court of Appeals of Iowa, Oxberger, C.J., filed an order whereby this opinion was "withdrawn from publication."

STATEMENT OF THE GROUNDS OF JURISDICTION

On February 2, 1993, the Court of Appeals of Iowa entered the judgment or decree sought to be reviewed. On April 2, 1993, the Supreme Court of Iowa, the state court of last resort, entered an order denying discretionary review of the judgment or decree. On April 8, 1993, the Court of Appeals of Iowa entered an

order correcting its judgment or decree. No orders respecting rehearing or granting an extension of time have been entered.

The statutory provision believed to confer jurisdiction on this Court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The following constitutional provision is involved in this case:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. §1, Amendment 14, Constitution of the United States of America, [*emph.*

supp.].

The following statutes are involved in this case:

> When requested under section 279.24, the commission shall submit a list of five qualified administrative law judges to the parties. The hearing shall be held pursuant to the provisions of chapter 17A relating to contested cases. *The full costs of the hearing shall be shared equally by the parties.* §272A.8, Code of Iowa (1989), [*emph. supp.*].
>
> * * * *
>
> For the purposes of... section... 279.24... the term "*administrator*" includes school superintendents... §279.23, Code of Iowa (1989).
>
> * * * *
>
> An administrator's contract shall remain in force and effect for the period stated in the contract. The contract shall be automatically continued in force and effect for one year beyond the end of its term, except... until terminated as herein provided....
>
> The board may, by majority vote of the membership of the board, cause the contract of an administrator to be terminated. If the board determines that it should consider the termination of a nonprobationary

administrator's contract, the following procedure shall apply:

On or before March 31, the administrator shall be notified in writing by a letter personally delivered or mailed by certified mail that the board has voted to consider termination of the contract. The notification shall be complete when received by the administrator.

The notice shall state the specific reasons to be used by the board for considering termination which for all administrators except superintendents shall be for just cause.

Within five days after receipt of the written notice that the board has voted to consider termination of the contract, the administrator may request in writing to the secretary of the board that the notification be forwarded to the professional teaching practices commission along with a request that the professional teaching practices commission submit a list of five qualified administrative law judges to the parties. Within three days from receipt of the list the parties shall select an administrative law judge... The hearing shall be held no sooner than ten days and not later than thirty days following the administrator's request unless the parties otherwise agree....

The administrative law judge selected shall notify the secretary of the board and the administrator in writing concerning the date, time, and location of the hearing. The board may be represented by a legal representative, if any, and the administrator shall appear and may be represented by counsel or by representative, if any. A transcript or recording shall be made of the proceedings at the hearing....

The administrative law judge shall, within ten days following the date of the hearing, make a proposed decision as to whether or not the administrator should be dismissed, and shall give a copy of the proposed decision to the administrator and the school board. Findings of fact shall be prepared by the administrative law judge. The proposed decision of the administrative law judge shall become the final decision of the board unless within ten days after the filing of the decision the administrator files a written notice of appeal with the board, or the board on its own motion determines to review the decision.

If the administrator appeals to the board, of if the board determines on its own motion to review the proposed decision of the administrative law judge, a private hearing shall be held before the board within five days after the

petition for review, or motion for review, has been made or at such other time as the parties agree.... The board may hear the case de novo upon the record as submitted before the administrative law judge. In cases where there is an appeal from a proposed decision or where a proposed decision is reviewed on motion of the board, an opportunity shall be afforded to each party to file exceptions, present briefs and present oral arguments to the board which is to render the final decision. The secretary of the board shall give the administrator written notice of the time, place, and date of the hearing. The board shall meet within five days after the hearing to determine the question of continuance or discontinuance of the contract. The board shall make findings of fact which shall be based solely on the evidence in the record and on matters officially noticed in the record.

The decision of the board shall be in writing and shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts and supporting (*sic*) the findings. Each conclusion of law shall be supported by cited authority or by reasoned opinion.... §279.24, unnumbered paragraphs 1, 4-12, Code of Iowa (1989), [*emph.*

supp.].

STATEMENT OF THE CASE

For approximately twenty years, Don N. West, ["West"], was either a principal or the superintendent of the Buffalo Center-Rake School District, ["school"]. [3/90 ALJ transcript, pp. 301, 364, 610, 992.] During those same twenty years, this small rural school was evaluated consistently as one on the best in Iowa, and for that matter, in the nation. [*Id.*, pp. 304, 377-378, 700-702, 704-705, 707-709, 833-834, 837-839, 859-860, 872, 875, 878-879, 1152, 1155-1161, 1253, 1257; 3/90 hearing ex. #80.] Many professional persons, both inside and outside the community, felt that West was an excellent, honest, and caring administrator, educator, and one of the persons responsible for the school's high

standing. [*Id.*, pp. 106-108, 551, 704-705, 838-839, 880-881, 885-890, 923-928, 993-999, 1007-1009, 1014-1015, 1021, 1074-1079, 1140-1142; 3/90 hearing ex. #26, #46, #78.]

However, in the years immediately preceding the 1989-1990 school year, West was stretched very thin by several factors: the state's imposition of stricter educational standards; state funding restrictions; a state push for sharing and consolidation amongst small schools; multiple whole-grade sharing negotiations; teacher incentive fund distribution; and a unionization of teachers. [*Id.*, pp. 185-194, 197-198, 523-524, 745, 781-782, 791, 800, 885-886, 904, 925-928, 977-979, 1016, 1021, 1035-1037, 1139-1141, 1145, 1161-1163, 1173, 1231-1242; 3/90 hearing ex. #52.]

West responded by: achieving the

first-in-Iowa, four-school sharing agreement; warning his directors to curtail their expenditures, (largely unheeded); attending a vast increase in meetings; and sharing himself as superintendent for the home and another school, as well as being secondary principal at still another of the sharing schools. [*Id.*, pp. 188, 288, 377-378, 600-601, 991-992, 1029-1030, 1035-1036, 1039, 1140-1142, 1154-1155, 1159, 1236-1237, 1242, 1322, 1373; 3/90 hearing ex. #12.] Unfortunately, by so sharing himself, [something necessary to save the home school and something originally endorsed by the directors], certain directors of the home school became jealous of his relations with the other schools and unhappy with the time West had left for them. [*Id.*, pp. 606-607, 1119-1120, 1126-1128; 3/90 hearing ex.

#83 and #104, pp. 90-91.]

For the 1989-90 school year, West and the school's Board of Directors, ["board"], were parties to a written superintendent contract. From approximately September, 1989, through November 28, 1989, a majority of the board met secretly several times, [probably in violation of the Iowa open meeting law], to discuss West. [*Id.*, pp. 30-31, 33, 110-115, 119-121, 125, 147-148, 573, 576-582, 597-598, 722-724, 730-731, 767, 799, 801-804, 952-955, 1178-1179.] During these meetings, to which West was not privy, this majority decided to terminate West. [*Id.*]

On November 28, 1989, following the several secret meetings of its members, the board required West to meet secretly with it. [*Id.*, pp. 31-32, 130, 132, 1179-1180.] At this tape-recorded

meeting, its president stated to West that the board had decided to terminate his contract for the 1990-91 school year:

> It is the feeling of the majority of the board that conditions have deteriorated in our school system to the extent that a change needs to occur. Therefore, I must inform you, Don, that there is not support from the board to be able to renew your contract for another year. [appendix offer of proof, pp. 19-20, 1/15/91 substituted appellant's brief, dist. ct. rec.]

None of the other five board members present contradicted him. [The board was comprised of seven members.]

On January 10, 1990, a majority of the board voted publicly to consider termination of its superintendent contract with West as of June 30, 1990. On January 30, 1990, the board served West with notice of this vote and the ten reasons it was considering for termination. West requested a hearing.

On March 8, 1990, the board served

interrogatory answers stating the thirty-nine set of facts, [some dating as far back as 1982], which comprised the ten reasons for considering termination. On their face, the facts patently reflected a board effort to throw the "kitchen sink" against West in hopes that some of its contents would "stick" as "smear".

On March 14-15, 22-23, and 29-30, 1990, an evidentiary hearing was conducted by an administrative law judge, ["ALJ"]. Of the 706 pages of testimony presented by the board's counsel, 386 pages consisted of testimony given by four of the seven board members. All four testified to their prejudgment that the reasons being considered for termination were valid. [app., pp. 138-143.] Evidence also was given concerning the prejudgment announced on November 28, 1989.

Indeed, during the opening statement on behalf of West, his counsel presaged the prejudgment which would be shown by the evidence:

> Following that meeting, the record is very clear, the board asked the superintendent to resign, or put perhaps more crudely, it reached a decision to fire the superintendent....
>
> [T]he sum and substance was... that in those closed meetings, the board of directors decided to terminate the superintendent, did so, and told him that he should resign....
>
> This business about which we're here today is no more than a Rube Goldberg attempt by the board of directors to patch up what's already done. [3/90 ALJ tr., pp. 7, 10, 11.]

During the ALJ hearing, West twice tried to compel production from the board of the 11/28/89 tape recording for introduction as evidence. [This was the recording from which the board chairman quotation, p. 12, *supra* this petition, was later taken]. However, the ALJ ruled

that he did not have the authority to compel production. [*Id.*, pp. 151-159, 236-237.]

At the conclusion of the hearing, the ALJ invited input on the issue of whether he had the authority to pass on the illegalities, [including due process deprivations], claimed by West. [*Id.*, pp. 1380-1381.] In its post-hearing brief, the board counsel argued that he did not. In his post-hearing brief, West's counsel argued that the ALJ should hold that no decision of termination could be made. He so argued on the basis that the board would have to decide the termination decision as an impartial tribunal, after the ALJ proposed a decision, but that it could not do so because it had made the termination decision long before the ALJ proceedings began.

In the board's post-hearing brief, as well as during the hearing, the board's counsel further argued that even though section 279.24, Code of Iowa, set no standard for the termination decision, the standard was whether there was a "reasonable foundation" for termination. He did not define "reasonable foundation". His only supportive, authoritative citation was to a private school board association manual. The manual itself contained no definition or supportive, authoritative citation.

On April 9, 1990, the ALJ issued a proposed decision. [app., pp. 82-138.] In it, he found a small percentage of the "smear" facts listed in the interrogatory answers and of the reasons listed in the termination notice. [app., pp. 84-129.] He concluded that based upon his personal views of how school boards and

superintendents could and should act, there was a reasonable foundation to terminate. [app. pp. 84-129, 135-138.] He did not define reasonable foundation or explain why or how he employed this standard. [app. pp. 135-138.] He admitted that his findings of reasons were based in large part on the board members' testimony. [app. p. 91.] He also ruled that he had no authority to pass on the claimed illegalities. [app. pp. 129-132.] Finally, he blamed the board for starting a "chain of events" with its secret meetings which led to the breakdown of the board/superintendent relationship. [app. pp. 132-135.]

On April 16, 1990, West appealed to the board for a *de novo* review. Prior to hearing, West filed the following written exceptions to the proposed decision:

2. That Iowa law mandates that if

the Board of Directors of any school district determines that it should consider termination of an Administrator's contract, said Board shall notify the Administrator, in writing, of the proposed action and then "step back" and act as a neutral and impartial entity which holds hearings, finds facts and renders conclusions of law....

4. That objection or exception is made by the Administrator to the proposed decision of the Administrative Law Judge for the reason that the record in this case conclusively establishes that the Board of Directors of the Buffalo Center-Rake Community School District has reversed, in total, the statutory procedure for the consideration (emphasis supplied) of the termination of a non-probationary Administrator's contract and irrevocably decided to terminate same prior to the inception of the instant proceedings which reversal of procedure is wholly illegal and which illegality the Administrative Law Judge failed to consider in any respect.

5. That exception or objection is made to the proposed decision of the Administrative Law Judge for the reason that said Administrative Law Judge wholly failed and refused to consider whether the proposed action of the Board of Directors of the Buffalo Center-Rake Community School District violates constitutional or

statutory provisions.

> 6. That conclusive evidence exists in the record of this case that the proposed action of the Board of Directors of the Buffalo Center-Rake Community School District violates constitutional or statutory provisions. [admin. except. to prop. dec., pp. 1-2, school board rec.]

West also filed the following written objections and exceptions to the board itself:

> 6. That Superintendent, Don West, is entitled to have facts found and conclusions rendered by a fair, impartial and unbiased Board which will strictly guarantee his due process rights.
>
> 7. That the record in this case conclusively establishes that a majority of the Board of Directors of the Buffalo Center-Rake Community School District decided to terminate the contract of Superintendent, Don West, in 1989, all prior to the service of the Board's notice that it had voted to consider termination of the Administrator's contract.
>
> 8. That the record in this case conclusively establishes that said decision on the part of the Board was irrevocable.

9. That this Administrator knows, as does this Board, that this Board's search for a successor Administrator has already commenced.

10. That Superintendent West does not have available to him that fair, impartial and unbiased Board which Iowa law and due process considerations mandate.

11. That the Superintendent, Don West, objects and excepts to the Board of Directors of the Buffalo Center-Rake Community School District, as presently constituted, acting as a finder of fact or as that entity which renders conclusions of law for the reason that said Board has repeatedly and powerfully demonstrated, in the record of this case, its bias and intent to terminate the Superintendent's contract irrespective of any other considerations.

12. That the Board of Directors of the Buffalo Center-Rake Community School District should, in propriety, recuse itself from deliberations in this matter.

13. That as a separate objection and exception to the proposed decision of the Administrative Law Judge, the Administrator, Don West, states to the Board that said official did not consider, in any respect, the bias or partiality of the Board, as a neutral hearing

panel, which bias and partiality violates substantial due process rights of the Administrator and to which omission the Administrator objects and excepts.

14. That this objection and exception grounded in bias and partiality should be reviewed separately and independently by the Board of Directors of the Buffalo Center-Rake Community School District and separate findings of fact and conclusions of law made thereon.

15. That Administrator, Don West, by participation in any hearing held by the Board, does not, in any respect, waive, relinquish or surrender any claim or right to challenge or object or except to said Board of Directors on the grounds of bias or partiality.

16. That the record in this case conclusively establishes that, in simple terms, Administrator, Don West, cannot receive a hearing from the Board of Directors of the Buffalo Center-Rake Community School District that in any way conforms with due process requirements. [object. & except. to board, pp. 2-3, school board rec.]

On April 26, 1990, West appeared before the board for a private hearing. It consisted primarily of oral argument.

[4/26/90 hearing tr., school bd. rec.] West's counsel reiterated the written exceptions and objections. Indeed, he hung his head while professing:

> I have the sense that the result of today's hearing is a foregone conclusion. As a result, I do have a sense of futility about proceeding here...
>
> As I said, I don't think for a moment that I should be naive about any of these. I don't think anything I say or anything we bring is going to change your decision. I have learned... that you have already contacted the Department of Education and asked for assistance in obtaining a successor. [*Id.*, pp. 3, 12-13]

No board member responded to either the written or the oral objections, considered the recusal request, or in fact denied the statements made in support of them. [*Id.*]

On April 30, 1990, the board met in closed session for thirteen minutes. [appendix offer of proof, pp. 41-45,

1/15/91 substituted appellant's brief, dist. ct. rec.] During this session, there was virtually no decisionmaking. [*Id.*] Even though only one or two members had attended the entire ALJ hearing, some not at all, no transcript of it was made available. [*Id.*] The board members primarily spent their time signing a pre-prepared termination decision which adopted and added to the proposed decision. [*Id.*; *see also*, app., pp. 76-82.] The pre-prepared decision represented that the board had reviewed the evidence *de novo*. [app., p. 79.] On April 30, 1990, there was no discussion or resolution of West's impartiality challenges or recusal requests.

On May 23, 1990, West timely appealed the board's termination decision to district court.

During the course of this appeal,

West tried to compel the board to produce as part of the record, or at least to introduce as new evidence, the tape recordings of certain secret board meetings concerning West. These included the 11/20/89, 11/28/89, 1/10/90, and 4/30/90 secret meetings. As the ALJ had before it, [although on different grounds], the district court stated that it did not have the authority to make this evidence part of the record.

On appeal to the district court, West asserted that he had been denied the constitutional due process of a fair and impartial decisionmaker because as shown by evidence in the record: (a) two of the decisionmakers had campaigned in 1989 on the promise to terminate him; (b) two of the decisionmakers had to decide whether West had made personal aspersions against them, one of the facts at issue;

(c) six of the decisionmakers had made and expressed their prejudgment in favor of termination as of the 11/28/89 meeting, prior to the 1/10/90 invocation of the termination proceedings; (d) during the 3/90 termination hearing, four of the decisionmakers had testified to their termination prejudgment; and (e) during the 4/26/90 and 4/30/90 decisionmaking, none of the seven decisionmakers was willing even to consider recusal. [app., pp. 144-196.]

On appeal to the district court, West further asserted that he had been denied constitutional due process because: (f) section 272A.8, Code of Iowa (1989), had required him to pay for half of the termination hearing costs; (g) section 279.24, Code of Iowa (1989), set no standard upon which to decide whether he should be terminated; and (h) the

"reasonable foundation" standard applied did not exist in section 279.24, and even if it did, it was so vague as to be void. [app., pp. 196-209.]

On August 1, 1991, the district court filed its judgment on appeal. [app., pp. 39-76.] In this judgment, the district court rejected the assertion that West had been deprived a fair and impartial decisionmaker. [app., pp. 62-69.]

The district court did so without the evidentiary benefit of the actual 11/28/89 tape recording. It also did so by transforming the 11/28/89 statement that there was no board support to renew his contract into a mere suggestion that he consider resigning, as well as by transforming the unequivocal board prejudgment to terminate into a simple "consensus" to suggest that West consider

resigning. [app., pp. 63-64, 66-67.] Thereby, it further portrayed the "consensus" as the board's "legitimate concerns" about West's performance which prompted their suggestion that he resign. [app., pp. 67-69.]

In this impartiality analysis, the district court also did not discuss in any way the prejudgment to which four decisionmakers testified during the ALJ hearing, the prejudgment campaign promises of two decisionmakers, or the bias risk of adjudging the personal aspersions alleged against two decisionmakers. [app., pp. 63-39.]

In this judgment, the district court additionally did not discuss in any way the asserted deprivations of due process caused by requiring West to pay for the due process or by the statute not containing a standard upon which to posit

the termination decision. [app., pp. 39-76.] It did hold that the reasonable foundation standard had been satisfied, but failed to define this standard or to explicate how it had been satisfied or why it was applicable, [other than by recitation to the unfoundationed manual of a private school board association]. [app., pp. 73-76.]

On August 8, 1991, West timely appealed the district court's judgment of affirmance.

On appeal to the appellate court, West reasserted each of the constitutional due process deprivation grounds that he had asserted before the district court. [app., pp. 241-281.] He particularly asserted the district court errors of not even addressing constitutional issues squarely placed before it. [app., pp. 252-260, 277, 278-

281.] He also asserted that there was a fundamental unfairness in not permitting West any means by which to place in the record the actual tape recordings which had been continuously in the board's possession and which placed beyond dispute the decisionmakers' prejudgment. [app., pp. 209-241.]

On February 2, 1993, an appellate court, the Court of Appeal of Iowa, filed an opinion. [app., pp. 1-76.] In this opinion, it affirmed the district court. [app., p. 76.] It also twice affirmed that West had the kind of property interest in the contract terminated, as was protected "under the due process clause". [app., pp. 18, 23.]

In doing so, the appellate court resolved the impartiality issue mostly by quoting the district court. [app., pp. 17-21.] As the district court had done

antecedently, it too did not explain in any way why the unequivocal prejudgment testimony of a board-majority did not demonstrate that West had been deprived of a fair and impartial decisionmaker. [*Id.*] As the district court had done antecedently, it too did not explain in any way why the decisionmakers should not have been disqualified for the campaign promises or personal aspersions alleged against them. [*Id.*]

In its opinion, the appellate court further followed the lead of the district court by not explaining in its affirmance how West had been afforded constitutional due process, given that West had been required to pay for the process, the statute set forth no termination standard, and the "reasonable foundation" standard applied was undefined and its application was undelineated. [app., pp.

22-27, 35-36.] It also held that there was no error in excluding the tape recordings of the critical board meetings from the record. [app., pp. 13-17.]

On April 2, 1993, a higher appellate court, the Supreme Court of Iowa, discretionarily denied West's application for further review.

On April 8, 1993, the Court of Appeals of Iowa corrected and withdrew its opinion from publication. [app., pp. 36-37.]

As this petition is filed and served upon the opposing party, West contemporaneously will serve the Attorney General of Iowa with a copy of it, per Rule 29.4(c), Rules of the Supreme Court of the United States, because 28 U.S.C. §2403(b) may be applicable.

ARGUMENT

Sometimes, cases simply slip through the cracks. Neither West, nor his counsel ever dreamed that they would have to appeal to the highest court in the land for a recognition that he never had a "fighting chance" to protect his property from forfeiture by the government. Nevertheless, here they are, arguing for due process denied, many miles away from their homes in rural Iowa.

In 1993, deprivation of due process rights guaranteed to every citizen of every state by the Fourteenth Amendment connotes as important a question of federal law as it did when the Amendment was ratified in 1868. Therefore, when three Iowa courts fail even to confront most of the claimed due process deprivations brought squarely to their attention, there necessarily are "special

and important reasons" for this Court to review such failures. Rule 10.1(c), Rules of the Supreme Court of the United States. Moreover, even if it was assumed *arguendo* that, and to the extent that, these three Iowa courts confronted the federal questions West repeatedly raised, there still would exist in their decisions "conflicts with the applicable decisions of this Court." *Id.*

Twenty-seven years ago, this Court examined a statute which, without more, directed decisionmakers to "determine, by their verdict, whether the county, or prosecutor, or the defendant shall pay the costs... " *Giaccio v. State of Pennsylvania*, 86 S.Ct. 518, 519, 383 U.S. 399, 400 (1966). This statute is indistinguishable from the pertinent Iowa statute. Plainly, the sixth unnumbered paragraph of section 279.24, Code of Iowa

(1989), without more, directed decisionmakers to determine whether a superintendent's contract, such as West's, should be terminated: "The notice shall state the specific reasons to be used... which for all administrators except superintendents shall be for just cause." [*emph. supp.*]

Therefore, because the Iowa courts have failed to do so, this Court should declare section 279.24 "invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory... " terminations. *Giaccio, supra*, S.Ct. at 520, U.S. at 402. Regardless of what any administrative law judge, school board, or Iowa court personally might think would be a "reasonable foundation" for

terminating a superintendent's contract such as West's, they impermissibly had to "make [their] determination of the crucial [termination] issue upon their notions of what the law should be instead of what it is." *Id.*, S.Ct. at 521, U.S. at 403. This was fundamentally unfair. *Cf.*, *Kolender v. Lawson*, 103 S.Ct. 1855, 1858, 461 U.S. 356, 357-358, 75 L.Ed.2d 903 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 102 S.Ct. 1186, 1193-1194, 455 U.S. 489, 497-499, 71 L.Ed.2d 362 (1982).

Moreover, this unfairness was exacerbated here by the fact that the decisionmakers, the board members, applied their "notions" before they ever triggered the other due process procedures required and prescribed by section 279.24. It was exacerbated even further by the fact that thereafter, the

Iowa courts merely rubber-stamped these "notions", as if the "notions" actually had been formulated prior to West being given an opportunity for input into the decisionmaking.

In many opinions over the years, this Court has decided that to be afforded due process, a party must be given a realistic opportunity to persuade the decisionmaker of the justness of his case, [in accordance, of course, with standards set by law, not with individual "notions"]. *E.g., Withrow v. Larkin*, 95 S.Ct. 1456, 1464, 421 U.S. 35, 46-47, 43 L.Ed.2d 712 (1975). The footings for these decisions have been fundamental:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or

> mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *Cit.* The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *Cit.* At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *cit.*, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610, 1613, 446 U.S. 238, 242, 64 L.Ed.2d 182 (1980).

Yet, despite these fundamental footings, the Iowa courts have affirmed a decision in which West clearly was not given the opportunity to persuade.

Here, before the decisionmaking was supposed to occur, a majority of the decisionmakers effectively testified to themselves that they believed the charges brought against West were true. app.,

pp. 138-143. In other words, it really did not matter what West presented for his case when his presentation was made to compete with the decisionmakers' beliefs in their own testimony. *See, In Re Murchison*, 755 S.Ct. 623, 625, 349 U.S. 133, 136, 99 L.Ed 942 (1955).

Further, if that did not constitute sufficient evidence in the record to demonstrate the deprivation of fair and impartial decisionmaking, then the additional, wide-ranging evidence of 1989 prejudgment which the Iowa courts ignored, should have:

(i) The uncontroverted and ignored facts of campaign promises were indistinguishable from the facts condemned in *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977).

(ii) The uncontroverted and ignored facts of personal aspersions were worthy

of the consideration this Court gave to similar facts in *Mayberry v. Pennsylvania*, 91 S.Ct. 499, 505, 400 U.S. 455, 465-466 (1971), and *Taylor v. Hayes*, 94 S.Ct. 2697, 2704-2705, 418 U.S. 488, 501, 41 L.Ed.2d 897 (1974).

(iii) The so-called "consensus"-building by the board in September-November, 1989, cannot under any circumstances be characterized fairly as being limited to the investigation, mere exposure to the evidence, or mere formation of impressions narrowly allowed by this Court in *Hortonville Joint District No. 1 v. Hortonville Educational Association*, 96 S.Ct. 2308, 2314, 2316, 426 U.S. 482, 483, 487-489, 49 L.Ed.2d 1 (1976).

Quite distinctively, there was evidence available that on November 28, 1989, five board members silently

endorsed the following statement read by a sixth board member to West: "I must inform you, Don, that there is not support from the board to be able to renew your contract for another year." [appendix offer of proof, pp. 19-20, 1/15/91 substituted appellant's brief, district ct. rec.] This pre-termination statement could not be more graphic. It pertained to exactly the issue that the board was required to decide after notice and opportunity to be heard, *viz.* whether to terminate or allow the automatic renewal of the contract. How then could an Iowa court decision passing off this plain prejudgment as some kind of "impressions", *i.e.* "legitimate concerns", not be in gross conflict with the decisions of this Court?

Quite naturally, it is acknowledged that the 11/28/89 verbatim statement was

not obtained by West, until after he appealed to district court, and was never allowed by the Iowa courts to become part of the record, [other than as an offer of proof]. Nevertheless, aside from the fact that there was much testimony already in the record corroborative of the statement, [also competing evidence from board members of trying to soften the termination mandate into a resignation suggestion alone], the inability of West to compel this evidence under the Iowa statutory scheme, as interpreted and applied, was itself another deprivation of due process. That is, how can it be fairly said that a person has had an opportunity to present the evidence in his favor when the law has denied him access to the evidence within the possession of his opponent/decisionmaker?

Beyond the deprivations of the opportunity to persuade, West also was made to carry the economic burden of paying for that flawed opportunity. *See*, §272A.8, Code of Iowa (1989). Half the hearing costs were assessed to him. Since the constitutionality of this assessment is a preserved issue which was never addressed by any Iowa court, it should be considered by this Court and declared to be "unconstitutional on its face because it imposes a significant and unjustified open-ended penalty on the exercise of a constitutional right." *Rankin v. Independent School District No. I-3*, 876 F.2d 838, 841 (10th Cir. 1989).

There is a certain irony in the final act of the Court of Appeals of Iowa. This final act was its unexplained one of withdrawing its opinion from publication. The effect of that act was

to withdraw it from *stare decisis*: "An unpublished opinion of the court of appeals may not be cited by a court or by a party in any other action or proceeding... " Court Rule 10(f), Iowa Supreme Court Rules.

In other words, because his case has no precedential effect, West may be, capriciously so, the only superintendent in Iowa ever to be subjected to the undefined, unfoundationed, and non-existent standard of "reasonable foundation" and to the kind of impartiality which existed in the record of his case. The clear inference is that some appellate court, or judge or justice of the same, had second thoughts about exposing the faulty rationale of the withdrawn opinion to the light of day. The clear shame is that no Iowa court, judge, or justice was able to see how

fundamentally unfair this rationale was, until after it had devastated West.

In closing, West acknowledges that the decisions in his case do not flatter him. There have been some unusually harsh criticisms leveled. Nonetheless, he emphatically denies that these criticisms were accurate and likewise exclaims that their inaccuracy is exactly why he feels so aggrieved by the due process deprivations.

There was a whole different view of the facts fairly deducible from the record, a view very favorable to him. *See*, 1/15/91 substituted appellant's brief, pp. 39-186, district ct. rec. That is the view which gave him due credit for his many years of devoted service to the school, for the many educational accomplishments he helped produce, and for the many recent

exigencies which caused him to be stretched so thin, through no fault of his own, and to be so much in need of help, not hindrance, from the board. [*See also*, pp. 8-10, *supra* this brief.]

Indeed, that is the very view of which he should have been given a realistic opportunity to convince a fair and impartial decisionmaker:

> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. *Cit.* Even when the facts are clear, the appropriateness and necessity of the discharge may not be before the termination takes effect. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 1494, 470 U.S. 532, 543-544, 84 L.Ed.2d 494 (1985).

That is also the view which well might have satisfied some non-termination

standards which could have been, but were not articulated by the Iowa legislature.

Accordingly, since the Iowa decisions in this case prevented an exercise of due process procedural rights guaranteed by both the Fourteenth Amendment and the decisions of this Court under it, "special and important reasons" exist for granting the instant petition for writ of certiorari, Rule 10.1, Rules of the Supreme Court of the United States, and West prays that grant for at least the following reason:

> [T]he very nature of the due process inquiry indicates that fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Walters v. National Association of Radiation Survivors*, 105 S.Ct. 3180, 3189, 473 U.S. 305, 321, 87 L.Ed.2d 220 (1985), quoting from *Matthews v. Eldridge*, 96 S.Ct. 893, 907, 424

U.S. 319, 344, 47 L.Ed.2d 18 (1976).

By: MARY JANE WHITE
Attorney at Law
405 West Main Street
Waukon, Iowa 52172
(319) 568-3551

By: _____
MARK S. SOLDAT
COUNSEL OF RECORD
714 East State Street
Algona, Iowa 50511
(515) 295-9463

ATTORNEYS FOR DON N. WEST

A P P E N D I X

IN THE COURT OF APPEALS OF IOWA

No. 2-476 / 91-1448

DON N. WEST,

Appellant,

vs.

Opinion Filed
February 2, 1993

BUFFALO CENTER-RAKE
SCHOOL DISTRICT, By
Its BOARD OF DIRECTORS,

Appellees.

DONIELSON, J.

Don West appeals from a decision of the district court affirming the decision of the Buffalo Center-Rake School Board which terminated his contract as superintendent of schools.

Don West had been superintendent of the Buffalo Center-Rake Community School District since 1981. In 1989, West and the school board began to have numerous disagreements over West's management style. The school board believed West had exercised considerable control over

every facet of the school's operations. For example, West had refused to provide the athletic director with keys to athletic facilities or rest rooms. West also had directed the school board's secretary and two school principles to not attend board meetings.

The board also discovered West had falsified reports to the High School Athletic Association, representing that the school district had a certified head wrestling coach, when it did not have such a coach. The board discovered West had attempted to secure an unauthorized double payment on part of his compensation package, and he had cashed a refund check payable to the school district by personally cashing it at an out-of-town bank. West also borrowed money from school funds by writing checks for cash and asking the school secretary

to hold the checks until he was paid.

On November 20, 1989, the school board met in a closed session and discussed the deteriorating relationship with West. West was not present. On November 28, 1989, the school board met again in a closed session with West present. At the meeting, the school board president suggested West resign. West refused, and a special meeting to evaluate West was held on January 3, 1990. Following the meeting, the board's evaluation found West had been performing less than satisfactorily in numerous areas, including delegation of duties, leadership, professionalism, honesty and trustworthiness.

On January 10, 1990, following another meeting in which West was evaluated, the school board voted five to one to consider termination of West's

contract as superintendent. The board listed ten separate grounds in support of his termination. On January 29, 1990, West was served with a notice of consideration of termination pursuant to Iowa Code section 279.24 (1989).

West then requested a formal administrative hearing pursuant to section 279.24. The hearing consisted of six days of testimony, and concluded on March 30, 1990. The administrative law judge issued a proposed decision which found reasonable grounds existed to terminate West's contract with the school board. West then requested the school board review the administrative law judge's decision. On April 30, 1990, the board met and voted for the termination of West's contract.

West then filed a notice of appeal to the district court on May 23, 1990.

West argued his substantial rights had been prejudiced because the board's action was unlawful under section 279.24. The district court affirmed the decision of the school board. West now appeals.

West argues the district court erred in: (1) failing to require the school board to submit the "entire record," and failing to permit the submission of additional evidence; (2) failing to address and resolve the issue of whether the vote to terminate should be invalidated because members of the school board were biased; (3) failing to address and resolve the issue of whether the school board complied with section 279.24; (4) failing to address and resolve the issue of whether West had been denied due process; (5) failing to define the standard for termination; (6) failing to mandate compliance with

statutory law and board policies; and (7) affirming the greater weight of the evidence supported the board's actions. In his reply brief, West also contends the administrative law judge lacked subject matter jurisdiction and therefore the action taken must be declared void.

On our review, we affirm the district court.

Appellate review of the school board's decision to terminate West is governed by Iowa Code section 279.24 (1989), which in pertinent part provides that a district court should affirm a board's decision unless:

> [S]ubstantial rights of the administrator have been prejudiced because the board action is:
>
> 1. In violation of constitutional or statutory provisions.
>
> 2. In excess of the statutory authority of the board.

> 3. In violation of board policy or rule.
>
> 4. Made upon unlawful procedure.
>
> 5. Affected by other error of law.
>
> 6. Unsupported by a preponderance of the evidence in the record made before the board when that record is reviewed as a whole.
>
> 7. Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Iowa Code § 279.24 (1989)

Our scope of review is to correct errors of law made by the district court. Board of Educ. v. Youel, 282 N.W.2d 677, 680 (Iowa 1979). The supreme court first applied this standard to Iowa Code section 279.24 by comparing to the language contained in Iowa Code chapter 17A, the Iowa Administrative Procedures Act. Briggs v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979). Therefore, we also may look to administrative agency

cases for assistance in determining the scope of review. Id., (citing Youel, 282 N.W.2d at 679).

> Because in these situations the district court is itself acting in an appellate capacity to correct the errors of law specified in section 17A.19(8) (here section 279.24) "the sole question is whether the district court correctly applied the law. In order to make that determination applies the standard of section 17A.19(8) [here section 279.24] to the agency [board] action to determine whether this court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order. If they are not, reversal may be required."

Id. (quoting Jackson County Pub. Hosp. v. Public Employment Relations Bd., 280 N.W.2d 426, 429-30 (Iowa 1976)).

I. **West's Compliance with the Iowa Rules of Appellate Procedure**. We first address West's failure to comply with the Iowa Rules of Appellate Procedure.

West's brief and argument is fifty-

four pages long. In the brief, West's attorney explains he was unable to reduce the factual summary so that it and the other mandatory brief parts were within the fifty-page limit. Therefore, West "incorporates by reference" a 186-page "substituted appellant's brief and appendix" which is located in the appendix. In the 186-page summary, West then cites directly to portions of the trial court record and not to the appendix. As a result, West has attempted to submit to this court a 240-page brief, and to require this court to search through the entire trial court record in order to find support for any of the factual assertions made by West in the summary.

Except by permission of the supreme court, required briefs shall not exceed fifty pages. Iowa R. App. P. 14(h).

Because West's attorney has not received such permission, this court will only consider the first fifty pages which have been submitted. Therefore, pages fifty-one through fifty-four of the brief are stricken, and we will not consider the arguments or issues presented therein.

Also, summaries, abstracts or narratives shall not be used in the appendix unless the parties have prepared an agreed statement of the case pursuant to Iowa Rule of Appellate procedure 15(f). Iowa R. App. P. 15(a). We find no such agreement in the record. Therefore, we will consider absolutely no portion of West's "substituted appellant's brief and appendix." Pages 24 through 209 of the appendix are stricken, and we will not consider any references to those pages of the appendix which are cited in the first fifty pages

of West's brief.

Also, prior to the submission of this appeal, West had moved for an order requiring the school board advance him the costs of producing those parts of the appendix the school board had designated. West contended the parts designated by the school board were unnecessary for the determination of the issues presented in West's appeal. Denying West's motion, Justice Neuman of the supreme court ordered "the appropriate appellate court shall determine whether either party has caused unnecessary matters to be included in the appendix."

Iowa Rule of Appellate Procedure 15(b) states, in part: "if either party shall cause matters to be unnecessarily included in the appendix, the appropriate appellate court may impose the cost of producing such parts on that party." We

find West's attempt to include the 186-page "substituted brief" clearly establishes that West has caused matters to be unnecessarily included in the appendix. Furthermore, because West had incorporated parts of the record in his "substituted brief," the school board had no choice but to designate any parts cited to in its brief to be included separately in the appendix. The school board could not be expected to cite to West's own factual summary as authority. We assess the costs of producing the appendix in this matter, a total of $2,440, to West.

West's counsel is strongly admonished to more closely adhere to the Iowa Rules of Appellate Procedure. We find his flagrant disregard of the appellate rules to be absolutely unacceptable and to be a violation of the

letter and spirit of those rules.

II. **Failure to Require the School Board to Submit the "Entire Record."** West contends the district court erred in failing to require the school board to submit the "entire record." Specifically, he argues the district court should have required the school board to include the records of several meetings which were held prior to January 29, 1990, the date on which formal notice of consideration of termination was given to West. West also argues the district court should have permitted additional evidence to be introduced in his appeal to that court.

We remind West that the district court was acting in an appellate capacity to correct errors of law. Briggs v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979). Again, reference to the

Iowa Administrative Procedure Act will be helpful in determining the district court's role in the the appeal of board's decision to terminate West. See id. Iowa Code section 17A.19(7) (1991) provides in pertinent part that: "In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate." The discretion granted to the court under this provision:

> is for the limited purpose of highlighting what actually occurred in the agency in order to facilitate the court's search for errors of law or unreasonable, arbitrary or capricious action.... The additional evidence permitted to be offered under such circumstances is not to be utilized as a springboard for trying issues of fact de novo in the district court.

Krause v. State ex. rel. Dep't of Human Servs., 426 N.W. 2d 161, 165 (Iowa 1988) (citations omitted).

In its ruling denying West's motion to require the school board to submit the entire record, the district court found:

> T]he logical starting point for purposes of compilation of the record for review begins with the formal written notice given by the Board to the Administrator [West] that it is considering termination of the administrator's contract. Closed meetings conducted by the Board occurring before that date, in this case January 29, 1990, would appear to be irrelevant and immaterial to the determination of the propriety of the Board's action under the seven grounds enumerated in [s]ection 279.24.

We agree with the reasoning of the district court. Under Iowa Code section 279.24 (1989), the procedure to terminate an administrator's contract begins with the issuance of notice that the school board has voted to consider termination of the contract. Obviously, the problems between West and the school board began long before the vote to consider termination was taken. However, it would

be difficult, if not impossible, to pinpoint the exact time and event in which termination was first considered by the board.

We find the issuance of the notice began the official procedure to terminate West. Therefore, it was well within the discretion of the district court both to find this event to be the logical starting point, and to find the evidence submitted to the district court constituted the "entire record." We find the district court did not err in finding the school board had submitted the entire record and in denying West's request to submit additional evidence.

West also contends the district court erred in requiring the excision of references to this excluded evidence from his 330-page trial court brief. The evidence had referred to events occurring

prior to January 29, 1990. The district court's decision in this regard is affirmed.

III. Impartiality of the Board. West next contends the district court erred in failing to address and resolve the issue of whether the vote to terminate should be invalidated because members of the school board were biased. Specifically, West contends the vote to terminate should have been invalidated because (1) two board members posed an unacceptable bias risk because of "personal aspersions" (2) two board members posed an unacceptable bias risk because of their prior statements on the merits of West's case; (3) four to five board members had prejudged the merits of the case; and (4) four to five board members acted as prosecutors, witnesses, and judges.

The interest of a superintendent in his or her contract, protected by state law, is a property interest under the due process clause. Wedergren v. Board of Directors, 307 N.W.2d 12, 16 (Iowa 1981) (citations omitted). A basic tenet of procedural due process is that a person is entitled to a fair hearing before an impartial tribunal. Id. (citations omitted).

West first contends the vote to terminate his contract should be invalidated because of "personal aspersions" he had made against two board members, prior statements two board members had made on the merits of the case, and the proven prejudgment of several board members. Although relations between the school board and West were certainly strained, we agree with the conclusions of the district

court:

> [T]he record merely shows that the board members held legitimate concerns about West's performance which prompted their suggestion that he resign. When West failed to communicate with the board about those concerns, the board had no other alternative but to initiate termination proceedings under [s]ection 279.24. . . .
>
> . . . Rather than being actually prejudiced against West which would preclude a fair decision on the issue of termination, the court determines that the board members had knowledge of incidents which seriously called into question West's performance as superintendent and attempted to address those concerns with West to allow him to respond.

We do not find there was such substantial prejudice so as to preclude a fair decision by the board. Wedergren, 307 N.W.2d at 18.

West also contends several of the board members acted as prosecutors, witnesses, and judges and therefore the vote to terminate his contract should be

invalidated. The supreme court in Wedergren carefully examined the role of school board members in a section 279.24 proceeding:

> In the performance of its duties, and in making the initial decision required by sections 279.24 and .25 to consider termination, a board must necessarily be exposed to facts of allegations about a superintendent's conduct. In the absence of evidence that a board has prejudged the facts of the case, we will not find a denial of due process by the combination of investigative and adjudicative functions.

Id. at 17.

The fact that the school board had previously been exposed to the allegations surrounding West is the reality of the relationship between a school board and its superintendent, especially in a smaller community such as the Buffalo Center-Rake School District. We do not find the school board had prejudged the facts of West's case. This

exposure neither substantially prejudiced West, nor precluded him from receiving a fair hearing.

The district court did not err by failing to find the vote to terminate West should be invalidated.

IV. **Compliance with Section 279.24.** West next contends the district court erred by failing to address and resolve the issue of whether the school board strictly complied with Iowa Code section 279.24 (1989). West specifically contends the Board had already determined to terminate West's contract prior to invoking the procedures provided in section 279.24.

We find the district court clearly addressed and resolved the issue of whether the school board complied with section 279.24. We note the language in the district court's findings:

> The record demonstrates that the board followed the mandates of [s]ection 279.24 and properly hired outside legal counsel, Mr. Thomas Lipps, to prosecute the case before the administrative law judge. . . . Following West's failure to respond, the board properly proceeding with the requirements of [section] 279.24. The court, therefore, concludes that the board was fair and impartial in adopting the proposed decision rendered by Administrative Law Judge Gaylen V. Hassman in this matter.

We will not review de novo how the school board complied with the provisions of section 279.24. Our scope of review is for the correction of errors of law. Board of Educ. v. Youel, 282 N.W.2d 677, 680 (Iowa 1979). We find the district court correctly determined the school board had complied with the procedures as set forth in section 279.24.

V. Constitutional Due Process. West next argues the district court erred by failing to address and resolve the issue of whether he had been denied due

process. Specifically, West contends section 279.24, the school board, and the district court all denied him due process because they terminated his contract without identifying any specific standard for termination.

West's interest in his contract is a property interest protected under the due process clause. Wedergren v. Board of Directors, 307 N.W.2d 12, 16 (Iowa 1981) (citations omitted). Again, we take notice of the language of the district court's findings:

> The court determines that the procedures followed by the board and as set forth under [s]ection 279.24 provided West with procedural due process. West was provided with ample notice and opportunity to be heard at the six-day hearing before Administrative Law Judge Hassman and the parties conducted extensive discovery prior to the hearing. The court determines that the two interests which are balanced in [s]ection 279.24 are the protection of the superintendent's interests in his employment contract and the

> board's ultimate authority to terminate or retain a superintendent under [s]ection 279.20 of the Iowa Code. On its face and as applied in this case, the court determines West was accorded constitutional due process during his termination proceeding under [s]ection 279.24 and [s]ection 272A.8 of the Iowa Code.

We find the district court more than adequately addressed and resolved this issue.

VI. Standard for Termination. West also contends the district court erred by failing to define the standard for termination. We do not agree.

Iowa Code section 279.24 (1989) provides, in relevant part: "The notice [for consideration of termination] shall state the specific reasons to be used by the board for considering termination which for all administrators except superintendents shall be for just cause." (Emphasis added.) West argued to the

district court that the above language created an undefined standard for the termination of a superintendent.

The district court, rather than failing to designate the appropriate standard for terminating West, held his termination was proper under two applicable tests, "just cause" and "reasonable foundation." In Wedergren, the supreme court applied the "just cause" test to the discharge of a superintendent during the first year of his three-year contract. 307 N.W.2d at 20. "Just cause " means conduct

> which directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. . . . On the other hand, "just cause" cannot include reasons which are arbitrary, unfair or generated out of some petty vendetta.

Briggs v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979). See also Wedergren, 307 N.W.2d at 20.

The district court also recognized that termination after the contract year of a superintendent need not be for just cause, and recognized the standard used by the administrative law judge. Relying upon language in section 279.24, the Wedergren case and the I.S.A.B. Certified Employee Contract Termination Procedure, the administrative law judge found "[a] decision to not renew a Superintendent's contract only requires the existence of a reasonable foundation to terminate which must be established by a preponderance of the evidence." (Emphasis added.)

We find West's termination was proper under either standard. Again, we note the language of the district court:

> Under either a just cause or reasonable foundation standard, this court concludes that the record overwhelmingly establishes that the vital components of any successful relationship, communication and trust, had disappeared between the board and Mr. West. West, by his actions and management style, alienated staff, faculty, administration and, as a consequence, the entire school system suffered.

We find the district court correctly identified a standard for termination, and affirm the district court in this regard.

VII. **Compliance with Statutory Law and Board Policies**. West next contends the district court erred by failing to mandate compliance with both statutory law and policies of the board.

One of the grounds for relief from the school board's action is "if substantial rights of the administrator have been prejudiced because the board action is . . . in violation of board

policy or rule." Iowa Code § 279.24(3) (1989). West contends the school board failed to comply with Iowa Code chapter 21, which dealt with the Iowa open meetings laws.

Even if violations of Iowa Code chapter 21 occurred, those violations do not preclude the initiation of section 279.24 proceedings. The supreme court in Wedergren addressed the identical issue, and held a violation of the open meetings law was not relevant to section 279.24 proceedings. 307 N.W.2d at 19. In Wedergren, the court explained:

> The March 8 meeting where the board vote was taken to consider termination was open to the public and should not be voided simply because on a prior occasion there was a possible violation of the open meetings law. . . . .It is enough for us to decide that, even if violations occurred, they would not void any action taken by the board in discharging Wedergren.

Id. (emphasis added). We find even if

violations had occurred, West has not shown substantial prejudice from those violations. The district court is affirmed in this regard.

VIII. **Substantiality of the Evidence.** West also contends the district court erred by affirming that a greater weight of the evidence in the whole record supported the board's decision.

The court shall grant relief "if substantial rights of the administrator have been prejudiced because the board action is . . . unsupported by a preponderance of the evidence in the record made before the board when that record is reviewed as a whole." Iowa Code § 279.24(3) (1989). Upon our review of the evidence presented at the hearing before the administrative law judge, we find the district court did not err in

holding that a preponderance of the evidence in the record supported the termination of West.

IX. Subject Matter Jurisdiction. Finally, in his reply brief West raises the matter of subject matter jurisdiction. He contends the administrative law judge lacked subject matter jurisdiction, and therefore any action taken by the administrative law judge must be declared void.

Specifically, West contends a statutory change in Iowa law between 1989 and 1991 left the Board of Educational Examiners without the authority to create a list of qualified persons to serve as administrative law judges. Therefore, he argues administrative law judge Hassman had no authority to act as such, and his proposed decision is void.

Under Iowa Code section 279.24

(1989), upon request of a formal administrative hearing, the Professional Teaching Practices Commission shall submit a list of five qualified administrative law judges to the parties. The presiding administrative law judge was to be selected from that list. Iowa Code § 279.24 (1989). Iowa Code section 272A.8 (1989) gave the Professional Teaching Practices Commission the specific statutory duty to maintain such a list. As of July 1, 1989, Iowa Code chapter 272A was repealed. 1989 Iowa Acts ch. 265, § 43. Iowa Code section 279.24 (1989) was not amended at that time.

Iowa Code section 279.24 (1991) now provides that the Board of Educational Examiners shall submit the list of qualified persons to serve as administrative law judges. Iowa Code

section 260.14 (1991) gives the Board of Educational Examiners the statutory duty of maintaining this list. These changes took effect on July 1, 1990. 1990 Iowa Acts ch. 1249, §§ 9, 13.

On February 2, 1990, West requested that the notice of termination of his contract be forwarded to the Professional Teaching Practices Commission and that the commission submit of list of five qualified administrative judges to the parties. On February 8, 1990, the school board submitted the request to the "Board of Educational Examiners f/k/a Professional Teaching Practices Commission." However, West contends between July 1, 1989 and July 1, 1990, there was no commission in effect from which to request an administrative law judge and no authority for any commission to issue such a list.

While we acknowledge there was a definite ambiguity between the repeal of chapter 272A and the language of Iowa Code section 279.24 (1989), we do not find a lack of subject matter jurisdiction. To resolve any ambiguity remaining in Iowa Code section 297.24 (1989), we resort to statutory construction. Metier v. Cooper Transport Co., 378 N.W.2d 907, 912 (Iowa 1985). We may consider the language used in the statute, the objects sought to be accomplished, the evils and mischief sought to be remedied, and place a reasonable construction on the statute which will best effectuate its purpose rather than defeat it. Id. We must examine both the language used and the purpose for which the legislation was enacted and consider all parts together without giving undue importance to one

single or isolated portion. Id.

In enacting Chapter 265 of the Iowa Acts (the 1989 act which repealed Iowa Code chapter 272A), the legislature specified that Chapter 265 was to be "an act establishing an autnomous board to perform the duties of the present board of educational examiners and professional practices commission." 1989 Iowa Acts ch. 265 (emphasis added). In Iowa Administrative Code chapter 287, the regulations governing the Professional Teaching Practices Commission were transferred to Iowa Administrative Code chapter 282 (which governed the Board of Educational Examiners).

It is clear the legislature intended the duties of the Professional Teaching Practices Commission to be transferred to the Board of Educational Examiners. Therefore, although the language of Iowa

Code section 297.24 (1989) was not modified until July 1, 1990, and between July 1, 1989 and July 1, 1990 there was no specific statute which gave the Board of Educational Examiners the authority to create this list, we find the legislature intended to give the Board of Educational Examiners this authority during the period between July 1, 1989 and july 1, 1990. We find the language of Iowa Code section 279.24 (1989) is sufficient to give the board of Educational Examiners the authority to create a list of potential administrative law judges. We do not find a lack of subject matter jurisdiction.

West also argues he should not be required to pay half the hearing costs because Iowa Code section 272A.8 (1989) was repealed as of July 1, 1989, and Iowa Code section 260.14 (1991) was not

effective until July 1, 1990. Therefore, he contends there was a one-year period during which the Iowa Code did not provide for an assessment of costs. Absent any provision on assessing the costs of the hearing, we find it was within the discretion of the administrative law judge to assess the costs equally between the parties.

The costs of this appeal are taxed to West.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 2-476 / 91-1448

DON N. WEST,
Appellant,

vs.

Order Filed

BUFFALO CENTER-RAKE SCHOOL DISTRICT, By Its BOARD OF DIRECTORS,
Appellees.

April 8, 1993

The above entitled opinion is withdrawn from publication.

Done this 8th day of April, 1993.

IN THE COURT OF APPEALS OF IOWA

No. 2-476 / 91-1448

DON N. WEST,
Appellant,

vs.

BUFFALO CENTER-RAKE SCHOOL DISTRICT, By Its BOARD OF DIRECTORS,
Appellees.

Order Filed
April 8, 1993

Pursuant to Iowa Supreme Court Rule 8.1, page 6 of the above-captioned case, filed February 2, 1993, is corrected as shown by the attached substituted page 6.

Done this 8th day of April, 1993.

I. **West's Compliance with the Iowa Rules of Appellate Procedure**. We first address West's failure to comply with the Iowa Rules of Appellate Procedure.

West's brief and argument is fifty-four pages long. In the brief, West's attorney explains he was unable to reduce the factual summary so that it and the other mandatory brief parts were within the fifty-page limit. Therefore, West "incorporates by reference" a 186-page "substituted appellant's brief and appendix" which is located in the appendix. In the 186-page summary, West then cites directly to portions of the trial court record and not to the appendix. As a result, West has attempted to submit to this court a 240-page brief, and to require this court to

search through the entire trial court record in order to find support for any of the factual assertions made by West in the summary.

Except by permission of the supreme court, required briefs shall not exceed fifty pages. Iowa R. App. P. 14(h). Because West's attorney has received such permission, it will be permitted in this instance.

Also, summaries, abstracts or narratives shall not be used in the appendix unless the parties have prepared an agreed statement of the case pursuant to Iowa Rule of

IN THE IOWA DISTRICT COURT
FOR WINNEBAGO COUNTY

Cause No. 14161-0590

JUDGMENT ON APPEAL

DON WEST,
Appellant,

v.

FILED ON
AUGUST 1, 1991

BUFFALO CENTER-RAKE
SCHOOL DISTRICT, by
its BOARD OF DIRECTORS,
Appellee.

BE IT REMEMBERED that on the 6th day of May, 1991, the above-entitled matter came on for hearing upon the appeal filed by appellant, Don N. West, on May 23, 1990. Appellant, Don N. West, appeared personally, represented by his attorney of record, Mr. Mark S. Soldat of Algona, Iowa, and appellee appeared, represented by their its attorney of record, Mr. Thomas W. Lipps of Algona, Iowa.

Counsel argued their respective positions and the court having reviewed the entire record on file now enters the following findings of fact, conclusions of law and judgment on appeal.

FINDINGS OF FACT

1. On January 30, 1990, appellee, Buffalo Center-Rake School District, by its Board of Directors ("Board"), personally served its notice of consideration of termination of administrator's contract upon appellant, Don N. West ("West"). The service of this notice resulted from action taken by the Board at its meeting on January 10, 1990. Said notice recited as follows:

"NOTICE OF CONSIDERATION OF TERMINATION OF ADMINISTRATOR'S CONTRACT

TO: Mr. Don West, Buffalo Center, Iowa 50424

You are hereby notified that the Board of Directors of the Buffalo Center-Rake Community School District has voted to consider termination of your continuing contract, effective at the end of the current school year. The contract to be terminated is the contract between Don West, as administrator, and the Board of Directors of the Buffalo Center-Rake Community School District, located at Buffalo Center, Iowa, for

services rendered during the 1989-1990, ending June 30, 1990.

This notice is given pursuant to the provisions of Section 279.24, Code of Iowa.

The reasons the Board has voted to consider termination of your contract are as follows:

1. The unsatisfactory evaluation of Superintendent West.

2. Superintendent West's general lack of professionalism including his failure to treat staff and board members professionally.

3. Superintendent West's dictatorial and intimidating management style.

4. The breakdown in communication between Superintendent West and the Board.

5. Poor communication between Superintendent West and staff members.

6. Superintendent West has transacted school business without the Board's knowledge.

7. Superintendent West has acted against the Board's wishes and against board policy.

8. Superintendent West lacks the ability to comprehend and manage the

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district's financial situation.

9. Superintendent West has borrowed money from the district and has used school property and has disposed of school property in violation of board policy.

10. Superintendent West has lost the trust of the majority of the Board of Directors of the Buffalo Center-Rake Community School District.

You are advised that within five days after receipt of this notice that the Board has voted to consider termination of your contract, you may request in writing to the Secretary of the Board, that the notification be forwarded to the Professional Teaching Practices Commission along with a request that the Professional Teaching Practices Commission submit a list of five qualified hearing officers, and that a hearing be held before such hearing officer as may be selected. If you fail to timely request a hearing before a hearing officer of the Professional Teaching Practices Commission, the Board, not later than April 15, may determine the continuance or discontinuance of your contract. This notice is dated at Buffalo Center, Iowa, this 29th day of January, 1990. Buffalo Center-Rake Community School District by Leona Van Hove, Secretary, Board of Directors."

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2. On February 2, 1990, West filed his notice upon the school district that the notice of consideration of termination be forwarded to the Professional Teaching Practices Commission, and requested a list of five qualified administrative law judges for purposes of selecting an appropriate judge for hearing.

3. on February 6, 1990, the Board relayed this notice to the Board of Educational Examiners, and Attorney Gaylen V. Hassman of Waverly, Iowa, was chosen as the administrative law judge to conduct the proceedings pursuant to Section 279.24.

4. The parties conducted extensive discovery and on May 5, 1990, ALJ Hassman gave notice of the hearing on March 14, 1990, at 9:00 o'clock a.m. The hearing was then held for six days on the date of

March 14th, 15th, 22nd, 23rd, 29th and 30th of 1990.

5. On April 9, 1990, ALJ Hassman entered his proposed decision which concluded, based upon the evidence presented, that a reasonable foundation existed to terminate the contract of West as Superintendent of the Buffalo Center-Rake Community School District.

6. On April 16, 1990, pursuant to Section 279.24, West filed his written notice of appeal from the ALJ's decision with the Board.

7. On April 26, 1990, a private hearing was held by the Board upon West's written notice of appeal. Argument was presented by West's counsel and counsel for the school board, Mr. Thomas Lipps. On April 30, 1990, at a special meeting of the Board, the Board entered its findings of fact, conclusions of law and

decision adopting ALJ Hassman's proposed decision terminating West. The Board found overwhelming evidence that West had lost the trust of the majority of the Board members, and concluded that a reasonable foundation existed to terminate West's contract.

8. West filed the within notice of appeal to the district court on May 23, 1990, alleging his substantial rights had been prejudiced because the Board action is:

> 1. In violation of constitution or statutory provisions.
>
> 2. In excess of the statutory authority of the Board.
>
> 3. In violation of board policy or rule.
>
> 4. Made upon unlawful procedure.
>
> 5. Affected by other error of law.
>
> 6. Unsupported by a preponderance of the evidence in the record made before the Board when that record is

reviewed as a whole.

7. Unreasonable, arbitrary, capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

9. ALJ Hassman made the following general findings of fact which this court determines are adequately supported by the record and are hereby adopted:

> "Don West is the Superintendent of the Buffalo Center-Rake Community School District and has been since 1981. Prior to serving as Superintendent at Buffalo Center-Rake, he was the Principal at the school for approximately twelve years. In addition to his present Superintendency duties at Buffalo Center-Rake, he also serves as Superintendent of the Titonka School District. Buffalo Center-Rake Community School is presently involved in a whole-grade sharing program with three other school districts, namely, Lakota, Titonka and Thompson. The shared high school program is known as North Iowa High School. Buffalo Center-Rake Community School District has approximately 400 students... The Board's notice of consideration of termination of administrator's contract details ten reasons why the Board voted to consider termination of Superintendent West's contract.

Discovery has elicited 38 specific incidents that comprise the ten reasons alleged.

Many if not most of the points of dissatisfaction over Superintendent West have to do with what can best be characterized as his 'management style' which was firm and involved in that he exercises a high degree of control over virtually all aspects of the school operation...The NCA report was favorable in many respects toward the school yet concerns were expressed in the areas of administration, communication, management style and staff morale. Mr. Mullenberg, the chairman of the evaluation committee, characterized the Superintendent West's management style as a 'firm hand' style and the report indicated that it was unrealistic to continue that style. The report further indicated that Superintendent West needed to delegate more responsibility and that the high school principal should have more input in many areas including staff selection. The report also indicated that staff members were confused as to where budgeting requests were to be directed and as a consequence, many instructors would bypass the principal and go directly to the superintendent. The report further noted that staff members felt a lack of input and lack of communication with the administration and that the consequence of that would be staff

morale problems.

There has been a significant breakdown in the communication and trust between Superintendent West and Buffalo Center-Rake Community School Board. Each school board member who testified at the hearing attested to such a breakdown or lack of trust between the Board and the Superintendent. This has occurred gradually over the last two years approximately and has culminated in the present proceedings...

The level of communication between Superintendent West and High School Principal Allen Monaghan is virtually nonexistent and has a detrimental impact on the operation of the Buffalo Center-Rake Community School District. The report of April, 1988, by the North Central Association evaluation team comments about the relationship between the Superintendent and High School Principal and the potential impact throughout the system. Some of the board members became aware that Superintendent West was communicating with High School Principal Monaghan almost exclusively by written notes and also learned of Principal Monaghan's frustration over severe limitations on his authority to act as Principal. In light of the NCA report and the complaints by Principal Monaghan, Erling Aalgaard and board member Gene Brass visited with Superintendent West in November

of 1988 and expressed strong concern about that relationship. Superintendent West indicated that he would try to do better. In the course of learning more about the poor relations between the Superintendent and Principal, the Board also learned that Superintendent West had directed Principal Monaghan, as he had prior High School Principal Fahlk, to not attend any meetings of the Buffalo Center-Rake School Board and not to have any contact with any of the school board members...

The lack of communication between the Superintendent and Principal was such that in September of 1988 the school board adopted a team management policy which was received into the record. It's obvious from this record that the team management policy was not followed by Superintendent West as it relates to Principal Monaghan. Monaghan had little if any input on interview of potential employees, equipment purchases, finances, teacher complaints, school decisions, etc. These matters were also noted in a general sense by the NCA report...

Superintendent West concedes that there are problems between he and Principal Monaghan but lays the responsibility for these problems with Principal Monaghan. In the opinion of the undersigned, both can take their fair share of the blame but it is the school board that is

free to choose how to resolve such a dispute or conflict as they see fit.

Superintendent West has over the years, assumed more and more responsibility by doing more and more of the school activities himself. In doing these additional duties, he did not always communicate clearly to others what he was doing. In many cases, such an administrative or management style is very effective in that it gets the work done and gets it done promptly. However, such a style has a tendency to trample on other's feelings, and is not always best in the long run for a large organization with lots of personnel such as a school system. Such actions tend to have a negative impact on morale as many of Superintendent West's actions have done...

There is in fact a staff morale problem at Buffalo Center-Rake that has been attested to by many witnesses. The staff morale problem has many causes but it is obvious from this record that the Superintendent's inability to communicate with certain staff members and the Superintendent's inability or unwillingness to communicate with the High School Principal and to delegate responsibilities to the High School Principal is a key factor in the low morale amongst a sizeable portion of the staff...

The undersigned finds that the Superintendent did cause, for three years, a false and inaccurate report to be made to the Iowa High School Athletic Association representing that Buffalo Center-Rake had a certificated head wrestling coach. The record shows that not only did Superintendent West authorize such reports to be made, he declined to alter the report when it was brought to his attention. This also has affected the Board's trust and confidence in the Superintendent.

The breakdown in trust and relationship between the Superintendent and the Board is established also by comments made by Superintendent West about the school board and its members. The record establishes that Superintendent West has publicly made derogatory comments about the school board by stating that it was the worst board he had ever worked with and the poorest board in the state. The record further establishes that Superintendent West made derogatory comments about President Aalgaard and board member Denny Wessels. These comments were made in public settings where others could easily overhear and where little if any discretion was exercised by the Superintendent. Other evidence establishing the breakdown in trust and relationship between the Board and the Superintendent is the letter written by Superintendent West to the school Board on May 31, 1989,

where Superintendent West, among other things, suggests a potential suit for back wages against the school and threatens to have the school board members removed or reprimanded because they were 'overstepping their authority'...

The record reveals that Superintendent West's administrative and leadership style became out of favor with this particular board and with others within the school system. Superintendent was so accustomed to such a style that it was difficult for him to adjust and he reacted improperly in several ways over the declining loss of control...

The record establishes that there has been a breakdown in communication between Superintendent West and the school board, poor communications between Superintendent West and staff members, and that Superintendent West has lost the trust of the majority of the Board of Directors of the Buffalo Center-Rake Community School District. The school board's lost of trust in the Superintendent is reasonable for the reasons set forth elsewhere herein and it is reasonable for the school district to conclude that the interests of the Buffalo Center-Rake School District will be served by a change in Superintendents." (4/19/90 Proposed Decision by ALJ Gaylen V. Hassman).

CONCLUSIONS OF LAW

The following Iowa Code sections are applicable to an analysis of the issues raised by Appellant West:

> "Section 279.20. The Board of Directors of a school district may employ a Superintendent of Schools for a term not to exceed three years. However the Board's initial contract with a superintendent shall not exceed one year if the Board is obligated to pay a former superintendent under an unexpired contract. The superintendent shall be the executive officer of the Board and have such powers and duties as may be prescribed by rules adopted by the Board or by law. Boards of Directors may jointly exercise the powers conferred by this section."
>
> "Section 279.23. Contracts with administrators shall be in writing and shall contain all of the following:
>
> 1. The term of employment.
>
> 2. The length of time during the school year services are to be performed.
>
> 3. The compensation per week of five consecutive days or month of four consecutive weeks.

4. A statement that the contract is invalid if the administrator is under contract with another board of directors in this state covering the same period of time, until such contract shall have been released or terminated by its provisions.

5. Such other matters as may be agreed upon.

The contract shall be signed by the president and the administrator and shall be filed with the secretary of the board before the administrator enters upon performance of the contract. The contract shall not be tendered by an employing board to an administrator under its jurisdiction prior to March 15. A contract shall not be required to be signed by the administrator and returned to the board in less than twenty-one days after being tendered.

An administrator's contract shall be governed by the provisions of this section and Sections 279.23A, 279.24 and 279.25 and not by Section 279.13. For purposes of this section and Section 279.23A, 279.24 and 279.25, the term 'administrator' includes school superintendents, assistant superintendents, educational directors, principals, assistant principals, and other certified school supervisors as defined under Section 20.4."

"Section 279.23A. The board shall establish written evaluation

criteria and shall establish an(sic) annually implement evaluation procedures. The board shall also establish written job descriptions for all supervisory positions."

"Section 279.24. An administrator's contract shall remain in force and effect for the period stated in the contract. The contract shall be automatically continued in force and effect for one year beyond the end of its term, except as modified or terminated by mutual agreement of the board of directors and the administrator, or until terminated as hereinafter provided.

An administrator may file a written resignation with the secretary of the school board on or before May 1 of each year or the date specified by the school board for return of the contract, whichever date occurs first.

Administrators employed in a school district for less than two consecutive years are probationary administrators. However, a school board may waive the probationary period for any administrator who has previously served a probationary period in another school district and the school board may extend the probationary period for an additional year with the consent of the administrator. If a school board determines that it should terminate a probationary administrator's contract, the school board shall

notify the administrator not later than March 31 that the contract will not be renewed beyond the current year. The notice shall be in writing by letter, personally delivered, or mailed by certified mail. The notification shall be complete when received by the administrator. Within ten days after receiving the notice, the administrator may request a private conference with the school board to discuss the reasons for termination. The school board's decision to terminate a probationary administrator's contract shall be final unless the termination was based upon an alleged violation of a constitutionally guaranteed right of the administrator.

The school board may, by majority vote of the membership of the school board, cause the contract of an administrator to be terminated. If the school board determines that it should consider the termination of a nonprobationary administrator's contract, the following procedure shall apply:

On or before March 31, the administrator shall be notified in writing by a letter personally delivered or mailed by certified mail that the school board has voted to consider termination of the contract. The notification shall be complete when received by the administrator.

The notice shall state the specific reasons to be used by the school board for considering termination which for all administrators except superintendents shall be for just cause.

Within five days after receipt of the written notice that the school board has voted to consider termination of the contract, the administrator may request in writing to the secretary of the school board that the notification be forwarded to the board of educational examiners along with a request that the board of educational examiners submit a list of five qualified administrative law judges to the parties. Within three days from receipt of the list the parties shall select an administrative law judge by alternately removing a name from the list until only one name remains. The person whose name remains shall be the administrative law judge. The parties shall determine by lot which party shall remove the first name from the list. The hearing shall be held no sooner than ten days and not later than thirty days following the administrator's request unless the parties otherwise agree. If the administrator does not request a hearing, the school board, not later than April 15, may determine the continuance or discontinuance of the contract. School board action shall be by majority roll call vote entered on the minutes of the

meeting. Notice of school board action shall be personally delivered or mailed to the administrator.

The administrative law judge selected shall notify the secretary of the school board and the administrator in writing concerning the date, time, and location of the hearing. The school board may be represented by a legal representative, if any, and the administrator shall appear and may be represented by counsel or by representative, if any. A transcript or recording shall be made of the proceedings at the hearing. A school board member or administrator is not liable for any damage to an administrator or school board member if a statement made at the hearing is determined to be erroneous as long as the statement was made in good faith.

The administrative law judge shall, within ten days following the date of the hearing, make a proposed decision as to whether or not the administrator should be dismissed, and shall give a copy of the proposed decision to the administrator and the school board. Findings of fact shall be prepared by the administrative law judge. The proposed decision of the administrative law judge shall become the final decision of the school board unless within ten days after the filing of the decision the administrator files a written notice

of appeal with the school board, or the school board on its own motion determines to review the decision.

If the administrator appeals to the school board, or if the school board determines on its own motion to review the proposed decision of the administrative law judge, a private hearing shall be held before the school board within five days after the petition for review, or motion for review, has been made or at such other time as the parties agree. The private hearing is not subject to chapter 21. The school board may hear the case de novo upon the record as submitted before the administrative law judge. In cases where there is an appeal from a proposed decision or where a proposed decision is reviewed on motion of the school board, an opportunity shall be afforded to each party to file exceptions, present briefs and present oral arguments to the school board which is to render the final decision. The secretary of the school board shall give the administrator written notice of he time, place, and date of the hearing. The school board shall meet within five days after the hearing to determine the question of continuance or discontinuance of the contract. The school board shall make findings of fact which shall be based solely on the evidence in the record and on matters officially noticed in the record.

The decision of the school board shall be in writing and shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Each conclusion of law shall be supported by cited authority or by reasoned opinion.

When the school board has reached a decision, opinion, or conclusion, it shall convene in open meeting and by roll call vote determine the continuance or discontinuance of the administrator's contract. The record of the private conference and findings of fact and exceptions shall be exempt from the provisions of chapter 22. The secretary of the school board shall immediately personally deliver or mail notice of the school board's action to the administrator.

The administrator may within thirty days after notification by the school board of discontinuance of the contract appeal to the district court of the county in which the administrative office of the school district is located.

The court may affirm the school board's action. The court shall reverse, modify, or grant any other appropriate relief from the school board's action, equitable or legal,

and including declaratory relief, if substantial rights of the administrator have been prejudiced because the school board's action is any of the following:

1. In violation of constitutional or statutory provisions.

2. In excess of the statutory authority of the school board.

3. In violation of school board policy or rule.

4. Made upon unlawful procedure.

5. Affected by other error of law.

6. Unsupported by a preponderance of the evidence in the record made before the school board when that record is reviewed as a whole.

7. Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion."

"Section 279.25. An administrator may be discharged at any time during the contract year for just cause. The administrator shall be notified in writing that the board has voted to consider termination of the administrator's contract and the applicable procedures of section 279.24 shall apply."

I. FAIR AND IMPARTIAL BOARD

West complains the board committed numerous procedural errors prior to and during his termination process, thereby prejudicing his substantial rights. West's chief complaint is centered upon his belief that the board had prejudged his contract performance and therefore could not sit as an impartial board to determine the issue of termination. West's argument is similar to the contention of the superintendent in Wedergren v. Board of Directors, 307 N.W.2d 12 (Iowa 1981)

The record in this case reflects that individual board members became privy to information and complaints about West's performance far in advance of the service of the notice of consideration of termination. Following a meeting by the board on November 20, 1989, at which West was not present, individual members of

the board suggested to West that he resign at the next meeting on November 28, 1989. West refused to resign, and the board then formulated a number of questions pertaining to his performance to be asked at a closed meeting. On January 10, 1990, West elected not to go into closed session for the purpose of his evaluation, and when all questions pertaining to his performance went unanswered, the board voted to serve West with notice of the consideration of termination of his contract.

West contends that the board had already decided to terminate him when they suggested that he consider resigning. West argues that the board committed numerous violations of the Iowa open meetings law which substantially affected his rights during the evaluation and termination process.

As recognized in the Wedergren case:

> "In the performance of its duties, and in making the initial decision required by sections 279.24 and 279.25 to consider termination, a board must necessarily be exposed to facts or allegations about a superintendent's conduct. In the absence of evidence that a board has prejudged the facts of the case, we will not find a denial of due process by the combination of investigative and adjudicative functions....Ordinarily, some exposure of a decision-maker to facts in dispute does not automatically disqualify the decision-maker on due process grounds....We also do not find a violation of due process when the board voted to consider termination and also voted to terminate." (Citations omitted).

Id. at page 17.

It is clear from the record that the intent of the board in suggesting that West resign was motivated by the desire to not publicly embarrass West by going through a lengthy termination proceeding which ultimately ensued. The record further reflects that Erling Aalgaard,

president of the board, had visited with West regarding his performance prior to any suggestion of resigning. Following West's refusal to resign, the board attempted to address their concerns with West in a closed meeting which West himself rejected.

Although West argues that the "consensus" reached to suggest that West resign can be characterized as prejudgment by the board for termination of his contract status, West acknowledges in his brief "From the record, it is not quite clear when the board went from considering the termination to determining termination." Second Revised Appellant's Brief, page 227. The issue becomes whether that "consensus" is tantamount to prejudgment which substantially prejudiced West's rights during the termination process which

requires reversal, modification or granting of any other appropriate equitable or legal relief by this court under the circumstances of this case.

Section 279.24 of the Iowa Code has the built-in due process safeguard of a hearing before a disinterested administrative law judge. As stated in the Wedergren case:

> "In contrast, in Wedergren's case, due to a change in the termination statutes since Keith, the board was required to present its evidence at an adversary hearing before a hearing officer. Section 279.24. Its later decision to terminate had to be based solely on the record made at that hearing." Wedergren, at page 17.

In the opinion of this court, the record merely shows that the board members held legitimate concerns about West's performance which prompted their suggestion that he resign. When West failed to communicate with the board

about those concerns, the board had no other alternative but to initiate termination proceedings under Section 279.24. Following the six-day hearing before ALJ Hassman, the board adopted the proposed decision to terminate West.

The record demonstrates that the board followed the mandates of Section 279.24 and properly hired outside legal counsel, Mr. Thomas Lipps, to prosecute the case before the administrative law judge. Wedergren, at page 18; Board of Dental Examiners v. Hufford, 461 N.W.2d 194, 200 (Iowa 1990). Rather than being actually prejudiced against West which would preclude a fair decision on the issue of termination, the court determines that the board members had knowledge of incidents which seriously called into question West's performance as superintendent and attempted to

address those concerns with West to allow him to respond. Following West's failure to respond, the board properly proceeded with the requirements of §279.24. The court, therefore, concludes that the board was fair and impartial in adopting the proposed decision rendered by Administrative Law Judge Gaylen V. Hassman in this matter.

II. VIOLATION OF OPEN MEETINGS LAW

West argues that the board's decision to terminate on April 30, 1990, was made in violation of board policy or rule, made upon unlawful procedure, and affected by other error of law as the result of the board's alleged failure to comply with Chapter 21, the Iowa open meetings law. The meetings complained of are the subject of other litigation, Doden v. Aalgaard, et al., Winnebago County District Court No 14290. That

cause of action is still pending and there has not been any determination that the board committed open meetings violations. Consistent with prior interlocutory orders of this court, the court determined pursuant to the Wedergren case, that whether or not the board committed open meetings violations is irrelevant to the issues in this case. As stated in Wedergren:

> "The March 8 meeting where the board vote was taken to consider termination was open to the public and should not be voided simply because on a prior occasion there was a possible violation of the open meetings law. Finally, we find it unnecessary to decide whether other sanctions should be imposed for violation of Chapter 28A. The parties have apparently chosen to litigate the open meetings issue in another action under Section 28A.6. It is enough for us to decide that, even if violations occurred, they would not void any action taken by the board in discharging Wedergren."

The record in this case indicated that prior to November 20, 1989,

individual board members talked with each other on the telephone, similar to the factual pattern to the Wedergren case. On November 20, 1989, the board conducted an evaluation of West outside his presence and reach a "consensus" to suggest that he resign. Whether or not that particular meeting violated the Iowa open meetings law will be an issue for determination in the Doden v. Aalgaard case, and as recognized by the Supreme Court of Iowa in Wedergren, "Voiding of action taken at a secret meeting is not automatic." Wedergren, at page 19. The court determines that West was not actually prejudiced by the actions taken by the individual members or the board in this matter in discussing information relating to his performance. Similarly, the court concludes as in the Wedergren case that a technical violation of the

board's policy does not require reversal of board action pertaining to formal evaluation. Wedergren, Id. at page 19.

III. CONSTITUTIONAL ISSUES

West argues that he is entitled to constitutional due process during his termination proceeding and claims that Sections 279.24 and 272A.8 of the Iowa Code are unconstitutional. As recognized in the Wedergren case, a superintendent's interests in having his contract term honored and protected by state law is a property interest under the due process clause. Wedergren, Id. at page 16. The court determines that the procedures followed by the board and as set forth under Section 279.24 provided West with procedural due process. West was provided with ample notice and opportunity to be heard at the six-day hearing before Administrative Law Judge

Hassman and the parties conducted extensive discovery prior to the hearing. The court determines that the two interests which are balanced in Section 279.24 are the protection of the superintendent's interests in his employment contract and the board's ultimate authority to terminate or retain a superintendent under Section 279.20 of the Iowa Code. On its face and as applied in this case, the court determines that West was accorded constitutional due process during his termination proceeding under Section 279.24 and Section 272A.8 of the Iowa Code.

IV. JUST CAUSE

Section 279.24 in pertinent part provides:

> "The notice shall state the specific reasons to be used by the board for considering termination which for

> all administrators except superintendents shall be for just cause."

West argues that the above quoted portion of Section 279.24 creates a nonexistent or undefined standard for termination of a superintendent. This court determines that under Section 279.24, termination of a superintendent need not be for just cause. Wedergren, Id. at page 20. As stated in Briggs v. Board of Directors, etc., 282 N.W.2d 740 (Iowa 1979):

> "Perhaps no inflexible 'just cause' definition we could devise would be adequate to measure the myriad of situations which may surface in future litigation. It is sufficient here to hold that in the context of teacher faulty 'just cause' is one which directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. It must include the concept that a school district is not married to

> mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance. On the other hand, 'just cause' cannot include reasons which are arbitrary, unfair or generated out of some petty vendetta."

The administrative law judge concluded that a decision not to renew a superintendent's contract only requires the existence of a reasonable foundation to terminate which must be established by a preponderance of the evidence. I.A.S.B. Certified Employee Contract Termination Procedure, page 167 (1989). Under either a just cause or reasonable foundation standard, this court concludes that the record overwhelmingly establishes that the vital components of any successful relationship, communication and trust, had disappeared between the board and Mr. West. West, by his actions and management style,

alienated staff, faculty, administration and, as a consequence, the entire school system suffered. The court concludes that when the record is reviewed as a whole, a preponderance of evidence supports the board's action in terminating West as superintendent.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the board's action in terminating Don West as superintendent of the Buffalo Center-Rake School District be and the same is hereby affirmed.

Dated this 31st day of July, 1991.

BEFORE THE BOARD OF DIRECTORS BUFFALO CENTER-RAKE COMMUNITY SCHOOL DISTRICT

No Number Assigned

IN THE MATTER OF THE TERMINATION OF DON WEST, SUPERINTENDENT, BY THE BUFFALO

DECISION ISSUED APRIL 30, 1990

CENTER-RAKE COMMUNITY
SCHOOL DISTRICT.

A private hearing on Don West's written Notice of Appeal dated April 16, 1990, was held before the Buffalo Center-Rake Board of Education on April 26, 1990, at 8 o'clock p.m., at the school in Buffalo Center. The hearing was originally scheduled April 19, 1990, but by agreement of counsel it was rescheduled for April 26, 1990. Present at the hearing were Don West, his attorney, James Stanton, Attorney Thomas W. Lipps, Board Members Erling Aalgaard, Denny Wessels, Gene Brass, Ray Smith, Bruce Myers, Karl Hove and Sue Kiewiet. Sue Kiewiet was present as an observer but she did not participate in this private hearing as she was not a member of the Board during the termination

proceeding before the Administrative Law Judge.

Superintendent West filed with the Board two documents, one entitled Administrator's Exception to Proposed Decision and the other entitled objections and Exception to Board, both of which were reviewed by the Board. Mr. Stanton then made a statement to the Board, followed by a statement by Mr. Lipps. After caucusing in private, the Board then propounded several questions to the parties, to which responses were made. Thereafter President Aalgaard called a special meeting to be scheduled April 30, 1990, at which time the Board was to complete the deliberations on Superintendent West's appeal and vote whether to continue or discontinue Superintendent West's contract. At that point, the private hearing adjourned and

the Board commenced deliberation.

FINDINGS OF FACT

The Board has review do novo, the evidence presented at the six (6) day hearing held pursuant to Iowa Code Section 279.24 and the record herein. Although not bound by the decision, great weight to the reasons and decision of the Administrative Law Judge, Gaylen Hassman, who was appointed as an impartial hearing officer. The Board adopts the findings of fact made by the Administrative Law Judge with the additions or exceptions as set forth hereafter.

Superintendent West has exhibited a lack of understanding in critical areas of school finance, in particular the application of Phase I and II funds in the District for the 1987-88, 1988-89 and 1989-90 school years. The salary schedule in the Buffalo Center-Rake

School District was increased from a $15,525 B.A. base (Exhibit 40) during the 1986-87 school year to $18,000 (Exhibit 43) for the 1987-88 school year. Phase I and II funds were incorporated into the new salary schedule and used to support the base. In 1988-89, the phase money (about $35,000) was distributed directly to the staff in separate checks over and above their base salary. The Buffalo Center-Rake Board did not have any obligation to distribute the phase money separately in 1988-89 and the Board did not intend to give the teachers a raise in 1988-89. Mr. West was responsible for this erroneous payment. Mr. West was unclear until sometime after he first testified at the administrative hearing as to how the phase monies were actually distributed. Mr. West has also made several mistakes by assigning teachers to

the wrong step and lane.

Superintendent West complains that the November 20, 1989, closed session was held improperly. This Board is made up of unpaid volunteers. Although the Board is ultimately responsible for its actions and is expected to have some knowledge of parliamentary procedure, it is reasonable for the Board to expect advice and guidance from its professional administrator, the superintendent, in complying with the open meetings law. When the Board retired to closed session on November 20, 1989, Superintendent Don West was present and made no objections as to procedure nor did he recommend a different procedure.

CONCLUSIONS OF LAW

The board adopts the conclusions of law submitted by Administrative Law Judge, Gaylen V. Hassman. There is

overwhelming evidence that Superintendent West has lost the trust of the majority of the board of Directors of the Buffalo Center-Rake School District. Accordingly, the Board concludes that a reasonable foundation exists to terminate the contract of Don West as Superintendent. Therefore, it is the decision of this Board that Superintendent West's contract be terminated.

Dated the 30th day of April, 1990.

BEFORE THE BOARD OF EDUCATIONAL EXAMINERS

No Number Assigned

IN THE MATTER OF:
BUFFALO CENTER-RAKE
COMMUNITY SCHOOL
DISTRICT,

Plaintiff,

vs.

PROPOSED DECISION
ISSUED ON APRIL
9, 1990